IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN OVERSIGHT, *Plaintiff,* v. U.S. DEPARTMENT OF STATE, *Defendant.*	Case No. 19-cv-2934 (CRC)

REPLY IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

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CASES

ACLU v. Dep't of Defense,
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Aguilera v. FBI,
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Am. Oversight v. U.S. Dep't of Health and Human Servs.,
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Atlas Air, Inc. v. Int'l Bhd. of Teamsters,
928 F.3d 1102 (D.C. Cir. 2019) 10

C*itizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*,
711 F.3d 180 (D.C. Cir. 2013) 5

Cleaver v. Kelley,
427 F. Supp. 80 (D.D.C. 1976) 7, 8

Ctr. For Biological Diversity v. U.S. Fish and Wildlife Serv.,
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Elec. Privacy Info. Ctr. v. Dep't of Justice,
416 F. Supp. 2d 30 (D.D.C. 2006) 6, 7

Jacksonville Port Auth. v. Adams,
556 F.2d 52 (D.C. Cir. 1977) 19

Jordan v. U.S. Dep't of Justice,
591 F.2d 753 (D.C. Cir. 1978) 17

Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.,
895 F.3d 770 (D.C. Cir. 2018) 5

Nat'l Immigration Law Ctr. v. U.S. Dep't of Homeland Sec.,
No. 1:19-cv-866 (D.D.C. Apr. 1, 2019) 8

Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978) 19

Payne Enters., Inc. v. United States,
837 F.2d 486 (D.C. Cir. 1988) 7

Rockwell Int'l Corp. v. U.S. Dep't of Justice,
235 F.3d 598 (D.C. Cir. 2001) 15

Wash. Post v. Dep't of Homeland Sec.,
459 F. Supp. 2d 61 (D.D.C. 2006) 8, 10

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 10

STATUTES

5 U.S.C. § 552 ..... *passim*

5 U.S.C. § 552 (b)(5) 16

5 U.S.C. § 552 (a)(6)(A) 5, 25

5 U.S.C. § 552 (a)(6)(B) 5, 25

OTHER AUTHORITIES

Alan Smith & Geoff Bennett, *State Department Blocks Ambassador From Testifying in Trump Impeachment Inquiry*, NBC News (Oct. 8, 2019, 8:32 AM), https://www.nbcnews.com/politics/donald-trump/trump-administration-orders-ambassador-center-ukraine-scandal-not-appear-congress-n1063636 15

Andrew Desiderio et al., *Marie Yovanovitch Says Trump Ousted Her Over 'Unfounded and False Claims,'* Politico (Oct. 11, 2019, 8:18 PM), https://politi.co/2q5Ejp4 ..... 11, 24

Burgess Everett, *McConnell Eyes Quick Impeachment Trial in the Senate*, Politico (Oct. 16, 2019, 3:39 PM), https://www.politico.com/news/2019/10/16/mcconnell-impeachment-trial-senate-048599 12

Camilio Montoya-Galvez, *Defense Chief Says Pentagon Will Comply With Subpoena for Trump-Ukraine Documents*, CBS News (Oct. 13, 2019, 10:44 AM), https://www.cbsnews.com/news/impeachment-inquiry-pentagon-to-comply-with-subpoena-defense-secretary-mark-esper-face-the-nation/ 14

Felicia Sonmez et al., *House Democrats Subpoena Perry, Giuliani Associates; Trump to Hold First Campaign Rally Since Impeachment Inquiry Launch*, Wash. Post (Oct. 10, 2019, 10:06 PM), https://wapo.st/2MKmCD8 11

Greg Stohr & Eric Watson, *Pelosi Need for Speed on Impeachment Makes Court Help Unlikely*, Bloomberg (Oct. 14, 2019, 4:00 AM), https://bloom.bg/31g9IBT 12

Jeremy Herb et al., *Former U.S. Ambassador to Ukraine Says Trump Wanted Her Removed and Blames 'Unfounded and False Claims,'* CNN (Oct. 11, 2019, 9:38 PM), https://www.cnn.com/2019/10/11/politics/marie-yovanovitch-testimony-ukraine/index.html 16

John Hudson et al., *Ousted Ambassador Marie Yovanovitch Tells Congress Trump Pressured State Dept. to Remove Her*, Wash. Post (Oct. 11, 2019, 10:45 PM), https://wapo.st/2AZm7j9 15

Karoun Demirjian & Shane Harris, *Trump's Former Top Russia Adviser Expected to Discuss Giuliani, Ukraine in Impeachment Probe Testimony*, Wash. Post (Oct. 14, 2019, 12:01 PM), https://wapo.st/2IPsGZG 11

Karoun Demirjian et al., *House Democrats Focus on Mulvaney, Bolton After Key Witness Testimony in Impeachment Inquiry*, Wash. Post (Oct. 15, 2019, 4:24 PM), https://wapo.st/35Fq3DB 16

Kevin Breuninger & Dan Mangan, *Trump Authorizes Release of Transcript of Controversial Ukraine Call that Mentioned Joe Biden*, CNBC (Sept. 24, 2019, 4:13 PM), https://www.cnbc.com/2019/09/24/trump-says-he-authorized-the-release-of-complete-fully-declassified-and-unredacted-transcript-of-ukraine-call.html 17

Lauren Egan & Courtney Kube, *Defense Secretary Mark Esper Will No Longer Comply with Impeachment Inquiry*, NBC News (Oct. 16, 2019, 7:41 AM), https://www.nbcnews.com/politics/trump-impeachment-inquiry/defense-secretary-mark-esper-will-no-longer-comply-impeachment-inquiry-n1067226 ..... 14, 20

Ltr. from Mike Pompeo, Sec'y of State, to Rep. Engel, Chair of U.S. House of Reps. Comm. on Foreign Affairs (Oct. 1, 2019), https://wapo.st/2oz2JGO 14, 20

Ltr. from Pat Cipollone, Counsel to the President, to Nancy Pelosi, Speaker, U.S. House of Reps., et al. (Oct. 8, 2019), https://www.washingtonpost.com/context/letter-from-white-house-counsel-pat-cipollone-to-house-leaders/0e1845e5-5c19-4e7a-ab4b-9d591a5fda7b/ 14, 20

Ltr. from Rep. Engel, Rep. Schiff, & Rep. Cummings, Chairs of U.S. House of Reps. Comms. on Foreign Affairs, Intelligence, & Oversight, to Mike Pompeo, Sec'y of State, (Sept. 9, 2019), https://bit.ly/33CD3Im 13, 20

Ltr. from Robert R. Hood, Assistant Sec'y of Defense for Leg. Affairs, to Rep. Engel, Rep. Schiff, & Rep. Cummings, Chairs of U.S. House of Reps. Comms. on Foreign Affairs, Intelligence, & Oversight (Oct. 15, 2019), https://twitter.com/JakeSherman/status/1184241169351565313/photo/1 15

Memorandum, Notice of Intent to Issue Subpoena, Chairman Elijah E. Cummings (Oct. 2, 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019-10-02.COR%20WH%20Subpoena%20Memo%20and%20Schedule.pdf 13

Mike DeBonis & Rachael Bade, *Democrats Eye Quick Impeachment Probe of Trump as Freshman Push for Focus on Ukraine*, Wash. Post (Sept. 26, 2019, 7:31 PM), https://wapo.st/2nmAt9N 11

Natasha Bach, *The 5 State Department Officials Pompeo Doesn't Want to Testify*, Fortune, Oct. 4, 2019, https://fortune.com/2019/10/04/kurt-volker-testimony-yovanovitch-kent-sondland-brechbuhl-pompeo/ 18

Nicholas Fandos et al. *White House Declares War on Impeachment Inquiry, Claiming Effort to Undo Trump's Election*, N.Y. Times, Oct. 10, 2019, https://www.nytimes.com/2019/10/08/us/politics/sondland-trump-ukraine-impeach.html 18, 20

Peter Baker & Nicholas Fandos, *Bolton Objected to Ukraine Pressure Campaign, Calling Giuliani a 'Hand Grenade,'* N.Y. Times (Oct. 15, 2019, 6:11 AM), https://www.nytimes.com/2019/10/14/us/politics/bolton-giuliani-fiona-hill-testimony.html .. 16

Sarah D. Wire & Chris Megerian, *Democrats Threaten to Subpoena White House for Documents About Trump's Ukraine Call*, L.A. Times (Oct. 2, 2019, 8:34 AM), https://www.latimes.com/politics/story/2019-10-02/schiff-pelosi-trump-impeachment-inquiry 20

Sarah D. Wire & Chris Megerian, *Democrats Threaten to Subpoena White House for Documents About Trump's Ukraine Call*, L.A. Times (Oct. 2, 2019, 8:34 AM), https://www.latimes.com/politics/story/2019-10-02/schiff-pelosi-trump-impeachment-inquiry. 20

Secretary Pompeo (@SecPompeo), Twitter, https://twitter.com/SecPompeo/status/1179040126032367616 (last visited Oct. 3, 2019) 20

Seung Min Kim, *McConnell Says If House Impeaches Trump, Senate Rules Would Force Him to Start a Trial*, Wash. Post (Sept. 30, 2019, 7:51 PM), https://wapo.st/2MIa27k 11

Stephanie Baker & Greg Farrell, *Giuliani Is at the Center of the Trump Impeachment Investigation*, Bloomberg (Oct. 3, 2019, 4:00 AM), https://bloom.bg/2pAtP0x 16

U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2016, https://foia.state.gov/Learn/Reports/Annual/2016.pdf 22

U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2017, https://foia.state.gov/Learn/Reports/Annual/2017.pdf 22

U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2018, https://foia.state.gov/Learn/Reports/Annual/2018.pdf 22

U.S. Dep't of State, Mission, https://careers.state.gov/learn/what-we-do/mission/ 22

Weiyi Cai & Alicia Pariapiano, *Subpoenas and Requests for Evidence in the Trump Impeachment Inquiry*, N.Y. Times (Oct. 14, 2019, 2:10 PM), https://www.nytimes.com/interactive/2019/10/04/us/politics/president-trump-impeachment-inquiry.html..... 18

INTRODUCTION

The public records American Oversight seeks here go to the heart of a matter of truly extraordinary public importance. American Oversight has lawfully requested records with the potential to shed light on whether and how senior government officials acted in coordination with private parties, potentially at the president's behest, to use the power of the U.S. government to pressure a foreign nation to investigate one of the president's political opponents in order to gain an electoral advantage in a fast-approaching U.S. presidential election. This is a matter of such public significance that the U.S. House of Representatives has initiated a rapidly proceeding inquiry to determine whether the president should be impeached—a step so momentous that it has only occurred a handful of times in our nation's history. The records American Oversight's May 2019 Freedom of Information Act ("FOIA") requests seek are central to the matters that are the subject of Congress's inquiry. Indeed, the requests seek the release of many of the same records Congress has requested in the course of its investigation and seek the communications of the State Department ("State") officials Congress has sought to interview.

State does not contest these facts, and, accordingly, has now granted American Oversight's request for expedited processing, conceding that there is an urgent need to inform the public about the subject matter of American Oversight's requests. Nor does State contest that American Oversight is ultimately entitled to determinations in response to its requests and the production of non-exempt portions of the requested records. Instead, State advances a series of unconvincing arguments to oppose American Oversight's request that State be ordered to issue determinations nearly six months after receiving American Oversight's FOIA requests and promptly produce non-exempt, responsive records while those records may still offer the public a chance to petition their elected representatives in an informed manner regarding this matter of extraordinary significance to our democracy.

Congress intended FOIA to be a mechanism to inform citizens in order to enhance their ability to participate in our self-governance, not as merely a tool for historians to evaluate government records long after the fact in dusty archives. It is hard to fathom an urgent matter of greater public importance than the matter American Oversight's requests seek to shed light on: namely, whether the Trump administration, at the president's direction and the direction of his private surrogates, undertook an effort to use the power of the U.S. government to pressure a foreign government to investigate one of the president's political opponents in order to influence a U.S. presidential election, and whether that conduct merits the president's impeachment and removal from office. If State is permitted to delay the release of the public records related to this immensely important matter to conform to the agency's own subjective and self-interested view of what is "practicable"—and to refuse to even offer any estimate whatsoever of what production timeline it contends would be "practicable"—American Oversight and the public will be irreparably harmed by the inability to access and consider information relevant to the allegations against the president and his administration as Congress's impeachment inquiry takes place. Delay will deprive American Oversight and the public it serves of information necessary for informed participation in this process, including petitioning the elected representatives who will make the momentous decisions to vote to impeach or decline to impeach the president and, potentially, to remove or decline to remove the president from office.

The Court should not deny Plaintiff, and through it the public, the vital relief requested here based on either State's deceptively selective statistics related to the burdens it purports to face in processing FOIA requests (which conveniently omit the precipitous decline in FOIA requests the agency has received in recent years) or State's implausible argument that the absence of a "firm" deadline for an impeachment vote erases the prospect for irreparable harm

(despite a rapidly progressing impeachment inquiry and the statements of the officials with power over that inquiry). Nor should the Court decline to order the crucial relief requested here in deference to State's claim that only it may unilaterally determine a "practicable" schedule for processing and production of American Oversight's requests when such clear irreparable harm may result from delay. American Oversight asks only for the relief necessary to prevent that irreparable harm in this extraordinary case.

American Oversight asks that this Court order State to issue determinations in response to American Oversight's requests and produce non-exempt portions of responsive records by a date nearly six months after American Oversight submitted those requests. In this matter of incredible public importance, American Oversight's requested relief is hardly the demand for an immediate response to its requests that State insinuates it is, nor is it an attempt to bypass procedures designed to ensure fair treatment. American Oversight has requested the most practicable timeline for relief it may seek while still preventing irreparable harm to itself and the public it seeks to serve.

ARGUMENT

American Oversight is entitled to preliminary injunctive relief in this extraordinary case, which involves lawful requests for public records with the potential to inform American Oversight and the public about matters of the greatest importance. American Oversight is nearly certain to succeed on the merits as even State does not contest that American Oversight has submitted lawful FOIA requests and is entitled to determinations regarding the production of non-exempt portions of responsive records. American Oversight and the public it serves are nearly certain to suffer irreparable harm if the requested records—which State has conceded are urgently needed to inform the public—are not produced until after the conclusion of Congress's rapidly progressing impeachment inquiry. State's untenable defense that a "firm" deadline has

not been set for an impeachment vote does nothing to erase this high likelihood of irreparable harm in the absence of the requested relief, and State's articulation of the legal standard to be applied to this determination is simply wrong.

Further, a prompt response to American Oversight's request on this matter of historic importance will greatly serve the public's interest in informed participation in the governance of our democracy. This relief will also very likely aid numerous other FOIA requesters, as well as Congress, who have sought the same and related documents to those American Oversight requests here, which American Oversight intends to rapidly disseminate and post publicly. Finally, State's attempt to argue that relief here would harm the public interest is founded on a self-serving and circular argument that its delayed response is justified by its own conscious decisions to provide inadequate resources to meet its FOIA obligations—buttressed by greatly misleading citation to statistics related to its FOIA processing. This paltry claim should not be used to punish Plaintiff and the public it serves in this matter of urgent and vital public concern.

This Court is empowered to grant American Oversight's request that State be ordered to comply with its statutory obligations in this matter of urgent national concern. American Oversight asks that this Court use that power to prevent irreparable harm to Plaintiff and the public it seeks to serve.

I. American Oversight Is Likely to Succeed on the Merits, and a Court-Ordered Schedule for a Determination and Prompt Production Is Plainly Appropriate.

State neither contests that American Oversight has submitted proper FOIA requests for records subject to production by the agency, nor that American Oversight is entitled to a determination whether to grant or deny the requests and prompt production of the non-exempt portions of the records it has requested. And State has now conceded that American Oversight is entitled to expedited processing of the requests that are the subject of this litigation. In sum, State

has all but conceded that American Oversight is nearly certain to succeed on the merits in proving its entitlement to its requested relief: determinations in response to its requests and release of non-exempt portions of responsive records.

Yet, in claims contrary to the statutory text of the FOIA and common practice in FOIA litigation, State cobbles together an argument that American Oversight is somehow unlikely to succeed on the merits of its claims because (1) the statutory time-limits in the FOIA—which State concedes it has failed to meet—are only an administrative exhaustion mechanism, Def.'s Opp'n to Pl.'s Mot. for a Prelim. Inj. ("Def.'s Opp'n") at 13–14, ECF No. 6, and (2) nothing entitles Plaintiff to any definitive production schedule or production of non-exempt records by a "date certain," *id.* at 15.

It is unclear how State's arguments at all suggest that American Oversight is unlikely to ultimately prevail on its claims here. In any case, State is simply wrong. The FOIA statute clearly states that, as here, where the agency has deemed "unusual circumstances" to be present, the agency "shall" issue a determination within 30 working days. 5 U.S.C. § 552(a)(6)(A)(i) (requiring a determination in 20 working days); § 552(a)(6)(B)(i) (allowing up to an additional ten working days where "unusual circumstances" are present). And the D.C. Circuit has recognized the FOIA statute's requirement that agencies make requested records "*promptly* available," and that Congress included the statutory deadlines to "ensure this mandate did not become a dead letter." *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770, 774 (D.C. Cir. 2018). The Circuit has also held that following a statutorily required determination the agency must produce the requested records "within days or a few weeks of a 'determination,' not months or years." C*itizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013). As State acknowledges, an agency's

failure to comply with these statutory requirements entitles a FOIA requestor to bring suit, Def.'s Opp'n at 14, and this puts the agency's processing under court supervision.

Contrary to State's claim that American Oversight is not entitled to any order setting a definitive production schedule or "date certain" for the production of responsive records, courts hearing FOIA cases—even in the absence of preliminary injunction motions or circumstances of the extraordinary nature present here—routinely enter scheduling orders that govern agencies' processing and production rates, including setting deadlines for completion of processing and disclosure. *See, e.g.*, Minute Order, *Am. Oversight v. U.S. Dep't of Health and Human Servs.*, No. 1:17-cv-00827 (D.D.C. May 25, 2017) (ordering "defendants to review and process the approximately [11,000 pages of records identified by HHS and 2,348 documents identified by OMB] by no later than September 5, 2017"); Minute Order, *Ctr. For Biological Diversity v. U.S. Fish and Wildlife Serv.*, No. 1:18-cv-00342 (D.D.C. May 7, 2018) ("the agencies are ordered to process 600 records per month each, with the first production on May 31, 2018").

All that is different in this case is that, in light of the urgent public debate about the matters that are the subject of these requests, Plaintiff asks the Court to direct State to process the requested records within a timeframe that will prevent irreparable harm to American Oversight and the public to whom it will disseminate the crucial information it has requested. Precedent supports American Oversight's request and soundly refutes State's argument that it would be improper for this Court to order a schedule for the statutorily required determination and prompt processing, including a date by which production should be completed. Precedent likewise belies State's argument that American Oversight is entitled to nothing more than expedited processing at the rate State unilaterally deems "practicable." As a court in this district has said in a similar context, "[a]dopting the government's position—that an agency has unfettered discretion to

determine how long is practicable for processing expedited requests—would require the court to abdicate its 'duty' to prevent 'unreasonable delays in disclosing non-exempt documents.'" *Elec. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d 30, 38 (D.D.C. 2006) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)).[1]

And "[o]n numerous occasions, federal courts have entertained motions for a preliminary injunction in FOIA cases and, when appropriate, have granted such motions." *Id.* at 35; *see also ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) (granting preliminary injunction motion in FOIA case and requiring production within one month); *Aguilera v. FBI*, 941 F. Supp. 144, 152–53 (D.D.C. 1996) (granting preliminary injunction in FOIA case and requiring expedited processing to be completed within approximately one month); *Cleaver v. Kelley*, 427 F. Supp. 80, 81–82 (D.D.C. 1976) (granting preliminary injunction in FOIA case and requiring expedited processing to be completed within approximately twenty days). It is axiomatic that "[t]he FOIA imposes no limits on courts' equitable powers in enforcing its terms" and "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent [such] abuses." *Payne*, 837 F.2d at 494.

Nor has American Oversight asked, as State suggests, that the agency determine which records are responsive and are not exempt from disclosure "instantly." Def's Opp'n at 15. American Oversight has requested that the Court order State to make these determinations and produce the non-exempt portions of requested records nearly a month and a half after filing the

[1] The court further elaborated that "relevant case law establishes that courts have the authority to impose concrete deadlines on agencies that delay the processing of requests meriting expedition," and that the precedents of this district "implicitly reject the notion that the decision of practicability is to be determined solely by the agency and support the contention that courts have the authority, and perhaps the obligation, to scrutinize closely agency delay." *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 38.

instant motion and just shy of six months after its FOIA requests were submitted. Compl. ¶¶ 7, 15. This timeframe—the most generous that American Oversight can seek in order to prevent irreparable harm to itself and the public it seeks to serve based on the representations of congressional leaders and developments in Congress's impeachment inquiry—is completely in line with the time periods other courts have ordered for processing requests where irreparable harm would otherwise likely result.[2] *See Wash. Post v. Dep't of Homeland Sec.*, 459 F. Supp. 2d 61, 76 (D.D.C. 2006) (requiring processing and production, along with a *Vaughn* index, within 10 days); *Aguilera*, 941 F. Supp. at 152–53 (D.D.C. 1996) (requiring processing to be completed within approximately one month); *Cleaver*, 427 F. Supp. at 81–82 (requiring processing to be completed within approximately twenty days); *ACLU*, 339 F. Supp. 2d at 503 (requiring production within one month); Minute Order, *Nat'l Immigration Law Ctr. v. U.S. Dep't of Homeland Sec.*, No. 1:19-cv-866 (D.D.C. Apr. 1, 2019) (ordering production of one document within one day and completion of production within 10 days).[3]

[2] American Oversight notes that it has requested that this Court order determinations and productions of non-exempt portions of the records it has requested by November 15, 2019, "or such date as the Court deems appropriate." Pl.'s Mot. for a Prelim. Inj. at 1, ECF No. 4.

[3] State incorrectly argues—despite the ample precedent of courts granting preliminary injunctions in FOIA cases—that, irrespective of the extraordinary facts of this case, preliminary injunctions are generally not warranted in FOIA cases as a class. To support this dubious claim, Defendant first cites Congress's prescription that the government must file an Answer *more* quickly in FOIA cases than in other litigation. Def.'s Opp'n at 9–10 (citing 5 U.S.C. § 552(a)(4)(C)). But Congress's decision to require more rapid responses in these cases fairly suggests it desired that FOIA plaintiffs receive relief *more* rapidly than they would in other actions—a desire that is entirely compatible with the granting of preliminary relief in appropriate FOIA cases where there is a prospect of irreparable harm. State also bases its argument on the assertion that granting preliminary relief in FOIA cases actually grants the plaintiff "full relief," Def.'s Opp'n at 10–11, but that just isn't so. American Oversight actually seeks only an order seeking a timely determination and prompt processing of its request, which is well short of full relief. Plaintiff is not asking, for example, that the Court resolve disputes over its entitlement to any particular records or adjudicate at this time the propriety of any exemptions that Defendant

II. American Oversight Will Be Irreparably Harmed If the Requested Relief Is Not Granted.

American Oversight and the public it seeks to serve will be irreparably harmed if State does not provide determinations on these requests and produce non-exempt portions of the requested records until after Congress has concluded its impeachment inquiry and potentially voted on impeachment and removal of the president. State does not contest that the records American Oversight requested—which include records reflecting communications between senior State officials and Rudolph Giuliani or other private attorneys of the president or records reflecting communications about efforts to pressure the Ukrainian government to investigate one of the president's political opponents, Compl. ¶ 7—are central to the matters that Congress is investigating in its ongoing impeachment inquiry. *See* Pl.'s Mem. in Supp. of Pl.'s Mot. for a Prelim. Inj. (Pl.'s Br.) at 6, 11–15, ECF No. 4-1.

Instead, State unconvincingly attempts to shrug off the reported statements and actions of congressional leaders who have made clear that the impeachment inquiry will proceed rapidly to assert that American Oversight, and the public it serves, face only a "speculative" prospect of irreparable harm if the requested records are not released before the impeachment process has concluded—all while misstating the legal standard for the required showing of irreparable harm. State's suggestion that the application of FOIA exemptions to a portion of the requested records should prevent the court from finding irreparable harm is plainly incorrect in this case. State completely omits any mention of categories of records American Oversight has requested that are very unlikely to be exempt from disclosure under FOIA—particularly records reflecting

claims apply to responsive records—relief that FOIA plaintiffs can only seek later through summary judgement briefing. *See Wash. Post*, 459 F. Supp. 2d at 68 (agreeing that an injunction ordering the government to process a request would not necessarily mean Plaintiff would receive any documents and would leave the propriety of exemptions to be litigated).

communications with private (i.e. non-governmental) parties involved in the effort to pressure Ukraine to investigate one of the president's political opponents. Compl. ¶ 7.

A. Irreparable Harm to American Oversight and the Public Is Immediately Impending, Not Speculative—as Evidenced by the Statements and Actions of Those with Power Over the Impeachment Process.

State argues that American Oversight's requested relief is not necessary to prevent irreparable harm primarily because there is not a "firm" deadline for the conclusion of Congress's impeachment inquiry and, consequently, irreparable harm is not "certain." Def.'s Opp'n at 17–18. But State's assertion that the prospect of irreparable harm is merely "speculative," *id*. at 17, simply doesn't hold water, and State plainly misstates the legal standard—which requires only that such harm be "likely," not, as State argues based on long outdated precedent, that such harm be "certain."

As an initial matter, Supreme Court precedent and the subsequent precedents of this Circuit do not require that a movant show that irreparable harm is "certain," as State asserts, to obtain preliminary injunctive relief. Def.'s Opp'n at 16 (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)). Instead, the Supreme Court has said that a movant must only show that it "is *likely* to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added); *Atlas Air, Inc. v. Int'l Bhd. of Teamsters*, 928 F.3d 1102, 1112 (D.C. Cir. 2019) (stating plaintiff must show "a *likelihood* of irreparable harm") (emphasis added). This district has also appropriately required only a showing of *likely* irreparable harm in determining whether preliminary injunctive relief is appropriate in FOIA cases. *See* Pl.'s Br. at 15–16 (citing *Wash. Post*, 459 F. Supp. 2d at 75 (finding "a *likelihood* for irreparable harm exists if the plaintiff's FOIA request does not receive expedited treatment") (emphasis added)).

Even though American Oversight need not show that irreparable harm is "certain" if it

does not receive its requested relief, the prospect of irreparable harm in this case *is* a near certainty. Even State does not contest the central relevance of the requested records to the ongoing impeachment inquiry, and the elected representatives with power over the potential impeachment and removal of the president have made clear through their words and actions that they intend to move quickly through the impeachment process to a potential impeachment vote, and, if necessary, to move quickly to hold a Senate removal trial. *See* Pl.'s Br. at 6. State does not contest the accuracy of public reports that leaders in the House of Representatives have expressed their intention to conclude the impeachment process by the end of November, nor does State contest reporting indicating that the Senate Majority Leader has indicated he would, following any vote to impeach the president, hold a trial that would reach a rapid disposition. *See* McGrath Decl. ¶ 8.[4] Developments since the filing of the instant motion only further suggest that Congress firmly intends to move rapidly through its impeachment investigation and towards a potential impeachment vote. The House of Representatives has issued numerous additional subpoenas for documents and testimony and has heard, or sought to hear, the testimony of a steady stream of relevant witnesses.[5] And Members of Congress have expressed their continued

[4] Mike DeBonis & Rachael Bade, *Democrats Eye Quick Impeachment Probe of Trump as Freshman Push for Focus on Ukraine*, Wash. Post (Sept. 26, 2019, 7:31 PM), https://wapo.st/2nmAt9N; Seung Min Kim, *McConnell Says If House Impeaches Trump, Senate Rules Would Force Him to Start a Trial*, Wash. Post (Sept. 30, 2019, 7:51 PM), https://wapo.st/2MIa27k.

[5] *See, e.g.*, Andrew Desiderio et al., *Marie Yovanovitch Says Trump Ousted Her Over 'Unfounded and False Claims,'* Politico (Oct. 11, 2019, 8:18 PM), https://politi.co/2q5Ejp4; Karoun Demirjian & Shane Harris, *Trump's Former Top Russia Adviser Expected to Discuss Giuliani, Ukraine in Impeachment Probe Testimony*, Wash. Post (Oct. 14, 2019, 12:01 PM), https://wapo.st/2IPsGZG; Felicia Sonmez et al., *House Democrats Subpoena Perry, Giuliani Associates; Trump to Hold First Campaign Rally Since Impeachment Inquiry Launch*, Wash. Post (Oct. 10, 2019, 10:06 PM), https://wapo.st/2MKmCD8.

intention to rapidly conclude the impeachment process.[6]

State's citation to FOIA cases where preliminary injunctions were granted in light of impending dates scheduled for trials, evidentiary hearings, or elections does nothing to diminish the near certainty of irreparable harm in this case if American Oversight, and through it the public, are denied prompt access to the requested records. *See* Def.'s Opp'n at 16–17 (citing *Aguilera*, *Cleaver*, and *Washington Post*). In *Aguilera* and *Cleaver*, for example, the courts did not rely on the absolute certainty that relevant upcoming proceedings would occur precisely when scheduled. And those courts did not determine that the prospect of irreparable harm was insufficiently "certain" because the plaintiffs in those cases might seek a stay, continuation, or other rescheduling of the upcoming proceedings. *See generally Aguilera*, 941 F. Supp. 144; *Cleaver*, 427 F. Supp. 80.

In this case Congress's impeachment inquiry is already proceeding rapidly, and the statements and actions of the elected representatives with power over that inquiry and potential, subsequent votes on the president's impeachment and removal demonstrate that actions of immense public importance related to this inquiry are imminent. State's assertion that the absence of a set date for an impeachment vote renders any harm "speculative" should not be credited. American Oversight has requested public records that concern a matter of nearly unparalleled and urgent public importance, and the organization and public will be irreparably

[6] *See* Greg Stohr & Eric Watson, *Pelosi Need for Speed on Impeachment Makes Court Help Unlikely*, Bloomberg (Oct. 14, 2019, 4:00 AM), https://bloom.bg/31g9IBT; Burgess Everett, *McConnell Eyes Quick Impeachment Trial in the Senate*, Politico (Oct. 16, 2019, 3:39 PM), https://www.politico.com/news/2019/10/16/mcconnell-impeachment-trial-senate-048599 ("Senate Majority Leader Mitch McConnell told Senate Republicans on Wednesday that he expects Speaker Nancy Pelosi to approve articles of impeachment as early as Thanksgiving, according to five people familiar with Wednesday's party lunch. McConnell then surmised that the Senate could deal with the trial by Christmas, concluding the impeachment proceedings before the Democratic presidential primaries begin.")

harmed if the requested records are only released after Congress concludes its rapidly proceeding impeachment inquiry without granting the public an opportunity to petition their representatives in a fully informed manner.

The prospect of irreparable harm here is heightened by the Trump administration's strident refusal to cooperate with Congress's impeachment inquiry, which may prevent even members of Congress—and certainly the broader public—from accessing the vitally important records American Oversight seeks through any avenue outside of the relief requested in the instant motion.[7] As Plaintiff noted previously, on October 1, 2019, Secretary of State Pompeo characterized the testimony and document requests made by Congress as a part of its inquiry as

[7] As American Oversight has noted previously, Pl.'s Br. at 6, the records it seeks overlap substantially with the documents Congress has requested as a part of its inquiry. *Compare* American Oversight's request for "records reflecting communications" of senior State officials with "Rudolph Giuliani" or "regarding any plan by Rudolph Giuliani . . . to travel to Ukraine or to communicate with Ukrainian government officials," Compl. ¶ 7, *with* congressional request for "[a]ny and all records generated or received by Department officials with or referring to President Trump's Personal attorney, Rudy Giuliani," Ltr. from Rep. Engel, Rep. Schiff, & Rep. Cummings, Chairs of U.S. House of Reps. Comms. on Foreign Affairs, Intelligence, & Oversight, to Mike Pompeo, Sec'y of State, (Sept. 9, 2019), https://bit.ly/33CD3Im; *compare* American Oversight's request for "records reflecting communications" of State officials regarding "any other effort to encourage the Ukrainian government to investigate any matter related to former Vice President Joseph Biden or his son Hunter Biden," Compl. ¶ 7, *with* congressional request for "[a]ny and all correspondence sent to or received by the State Department . . . related to . . . Hunter Biden, Burisma Holdings, former Ukrainian Prosecutor General Yuriy Lutsenko, or Presidential Aide Andriy Yermak in the context of [the above described] potential or suggested investigations/legal cases," Ltr. from Rep. Engel et al.; *compare* American Oversight's request for "all records reflecting communications [] between State and the White House [] regarding the early recall of Ambassador to Ukraine Marie Yovanovitch," Compl. ¶ 15, *with* congressional request to the White House for "all documents and communications referring or relating to . . . Former Ambassador to Ukraine Marie 'Masha' Yovanovitch, including but not limited to the decision to end her tour or recall her from the U.S. Embassy in Kiev," Memorandum, Notice of Intent to Issue Subpoena, Chairman Elijah E. Cummings (Oct. 2, 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2019-10-02.COR%20WH%20Subpoena%20Memo%20and%20Schedule.pdf.

"only an attempt to intimidate, bully, and treat improperly" State officials. Pl.'s Br. at 7 n.9, 17 n.16.[8] Since the filing of the instant motion the administration's resistance to cooperation with Congress's impeachment inquiry has hardened even further. On October 8, 2019, Counsel to the President Pat Cipollone sent a letter to Speaker Pelosi and the chairs of U.S. House of Representatives committees rejecting the legitimacy of Congress's impeachment inquiry and stating flatly that "the Executive Branch cannot be expected to participate in it."[9]

The actions of executive branch agencies since Counsel Cipollone's White House letter have indicated a clear agency willingness to follow its direction to resist cooperating with Congress's investigation. Secretary of Defense Mark Esper had initially indicated that the Department of Defense ("DOD") would cooperate with Congress's impeachment inquiry, including by producing documents in response to a congressional subpoena.[10] But days later DOD backtracked, citing Counsel Cipollone's letter, and stated that it was now "unable to comply" with Congress's subpoena.[11] Since the filing of this motion, State has also directed

[8] Ltr. from Mike Pompeo, Sec'y of State, to Rep. Engel, Chair of U.S. House of Reps. Comm. on Foreign Affairs (Oct. 1, 2019), https://wapo.st/2oz2JGO.

[9] Ltr. from Pat Cipollone, Counsel to the President, to Nancy Pelosi, Speaker, U.S. House of Representatives, et al. at 7 (Oct. 8, 2019), https://www.washingtonpost.com/context/letter-from-white-house-counsel-pat-cipollone-to-house-leaders/0e1845e5-5c19-4e7a-ab4b-9d591a5fda7b/. In addition to refusing to comply with congressional subpoenas as a part of the impeachment inquiry, Counsel Cipollone's letter makes clear that the administration will *also* resist complying with congressional requests as a part of "the established oversight process." *Id.* at 7–8.

[10] Camilio Montoya-Galvez, *Defense Chief Says Pentagon Will Comply With Subpoena for Trump-Ukraine Documents*, CBS News (Oct. 13, 2019, 10:44 AM), https://www.cbsnews.com/news/impeachment-inquiry-pentagon-to-comply-with-subpoena-defense-secretary-mark-esper-face-the-nation/.

[11] *See* Lauren Egan & Courtney Kube, *Defense Secretary Mark Esper Will No Longer Comply with Impeachment Inquiry*, NBC News (Oct. 16, 2019, 7:41 AM), https://www.nbcnews.com/politics/trump-impeachment-inquiry/defense-secretary-mark-esper-

employees with information relevant to Congress's inquiry—including Ambassador Yovanovitch, who is the primary subject of American Oversight's second request, Compl. ¶ 15—not to testify or otherwise cooperate with the congressional investigation.[12] Given these statements and actions, the Court simply cannot rely on the prospect that Congress will be able to obtain and make public the important records that American Oversight seeks.[13]

B. American Oversight's Requests Seek Records that Are Subject to Substantial Public Disclosure and Are Unlikely To Be Exempt.

State half-heartedly argues that American Oversight may not suffer irreparable harm because "it is likely that much of the information" in records responsive to American Oversight's requests will be exempt from disclosure under the FOIA, citing the FOIA exemptions for classified information and inter-agency or intra-agency communications protected by litigation privileges. Def.'s Opp'n at 15, 18. But substantial portions of the records American Oversight has requested are very likely to be subject to nearly complete disclosure.

will-no-longer-comply-impeachment-inquiry-n1067226; Ltr. from Robert R. Hood, Assistant Sec'y of Defense for Leg. Affairs, to Rep. Engel, Rep. Schiff, & Rep. Cummings, Chairs of U.S. House of Reps. Comms. on Foreign Affairs, Intelligence, & Oversight (Oct. 15, 2019), https://twitter.com/JakeSherman/status/1184241169351565313/photo/1.

[12] John Hudson et al., *Ousted Ambassador Marie Yovanovitch Tells Congress Trump Pressured State Dept. to Remove Her*, Wash. Post (Oct. 11, 2019, 10:45 PM), https://wapo.st/2AZm7j9 ("According to House Democratic leaders, the State Department attempted to block Yovanovitch's testimony Thursday night, directing her not to attend the voluntary interview, in keeping with a White House letter this week stating that the administration would not cooperate with the impeachment inquiry."); Alan Smith & Geoff Bennett, *State Department Blocks Ambassador From Testifying in Trump Impeachment Inquiry*, NBC News (Oct. 8, 2019, 8:32 AM), https://www.nbcnews.com/politics/donald-trump/trump-administration-orders-ambassador-center-ukraine-scandal-not-appear-congress-n1063636.

[13] Additionally, as American Oversight has noted, the executive branch often turns documents over to Congress on the condition that they be kept confidential and not released to the broader public. Pl.'s Br. at 17 n.16 (citing *Rockwell Int'l Corp. v. U.S. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001).

In particular, American Oversight has requested records reflecting communications between senior State officials and private parties—including Rudolph Giuliani, a purported personal attorney and "fixer" to the president who has been a central figure in the impeachment inquiry[14]—that are exceedingly unlikely to contain classified information or to be rightfully withheld under FOIA Exemption 5's protection for "intra-agency and inter-agency" records. Compl. ¶ 7; 5 U.S.C. § 552 (b)(5). Additionally, given Mr. Giuliani's reported central role in the efforts to encourage Ukraine to investigate one of the president's political opponents and his reported involvement in efforts to recall the U.S. Ambassador to Ukraine,[15] it is possible or even likely that a large share of communications about the matters contained in American Oversight's requests, which might otherwise have been purely internal agency communications, are subject to disclosure because they included or copied Mr. Giuliani, a private party with no government position.[16] For example, emails between State and the White House concerning the recall of U.S. Ambassador to Ukraine Yovanovitch (responsive to one item of American Oversight's second

[14] Stephanie Baker & Greg Farrell, *Giuliani Is at the Center of the Trump Impeachment Investigation*, Bloomberg (Oct. 3, 2019, 4:00 AM), https://bloom.bg/2pAtP0x.

[15] *See* Jeremy Herb et al., *Former U.S. Ambassador to Ukraine Says Trump Wanted Her Removed and Blames 'Unfounded and False Claims,'* CNN (Oct. 11, 2019, 9:38 PM), https://www.cnn.com/2019/10/11/politics/marie-yovanovitch-testimony-ukraine/index.html.

[16] *See, e.g.*, Peter Baker & Nicholas Fandos, *Bolton Objected to Ukraine Pressure Campaign, Calling Giuliani a 'Hand Grenade,'* N.Y. Times (Oct. 15, 2019, 6:11 AM), https://www.nytimes.com/2019/10/14/us/politics/bolton-giuliani-fiona-hill-testimony.html (describing the campaign to pressure Ukraine's government as having been "run by Mr. Giuliani"); Karoun Demirjian et al., *House Democrats Focus on Mulvaney, Bolton After Key Witness Testimony in Impeachment Inquiry*, Wash. Post (Oct. 15, 2019, 4:24 PM), https://wapo.st/35Fq3DB (describing "shadow operation being conducted by Trump's personal lawyer Rudolph W. Giuliani to pressure Ukraine into digging up dirt on the president's political rival.")

request, Compl. ¶ 15) are very unlikely to be properly exempt from disclosure if Mr. Giuliani was copied on those emails. Even substantial portions of internal records reflecting communications regarding efforts "to encourage the Ukrainian government to investigate any matter related to former Vice President Joe Biden," Compl. ¶ 7, are likely to be subject to significant disclosure—where they might not ordinarily be—in light of the president's order fully declassifying and releasing the content of his July 25, 2019 call with the president of Ukraine.[17]

Even in those responsive records where some of the substance of internal deliberations may be redacted as exempt, the disclosable, unredacted portions of those records that are properly segregable are also likely to shed important light on which senior government officials have been involved in deliberations about matters central to Congress's impeachment inquiry and when they communicated about those matters[18]—including, potentially, records reflecting communications about efforts to pressure Ukraine to investigate one of the president's political opponents or records concerning the removal of former U.S. Ambassador to Ukraine Yovanovitch. Compl. ¶¶ 7, 15. This information is crucial to American Oversight's (and through it the public's) understanding of whether all individuals with key information have been

[17] Kevin Breuninger & Dan Mangan, *Trump Authorizes Release of Transcript of Controversial Ukraine Call that Mentioned Joe Biden*, CNBC (Sep. 24, 2019, 4:13 PM), https://cnb.cx/2lfS7ve.

[18] Agencies are required to release "any reasonably segregable portion of a record," that otherwise contains exempt information. 5 U.S.C. § 552(b). Here, consequently, even requested records with exempt material are likely to have important portions subject to public release. The names of high-ranking officials communicating about these topics, and the dates and times of their communications, are almost certainly subject to disclosure. And internal deliberations that *follow* agency decisions (such as communications regarding Ambassador Yovanvitch's removal, after the decision to recall her) are unlikely to be properly exempt under the commonly asserted deliberative process privilege, which protects only *pre*-decisional deliberations. *See Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978) (*en banc*).

interviewed in the course of Congress's impeachment inquiry or whether the administration has successfully blocked the testimony of individuals with important knowledge about the administration's actions in Ukraine.[19]

III. The Requested Relief Is Overwhelmingly in the Public's Interest and Granting the Relief Will Not Cause Harm to Others.

State asserts—with selective citation to statistics related to State's FOIA processing—that granting Plaintiff's requested relief will harm the public interest by delaying responses to other FOIA requesters. State's response simply ignores the public's vital interest in gaining access to information contained in the requested records while an urgent national debate rages over the merits of the potential impeachment and removal of the president for alleged attempts to coerce a foreign nation into influencing the forthcoming presidential election. State does not contest the vital importance of the requested records to this debate or the centrality of the requested records to the ongoing impeachment inquiry. Instead, State relies heavily on an argument that, in light of the purported burdens faced by the agency, processing American Oversight's requests by a date nearly six months after the requests were submitted will harm other FOIA requesters.

In fact, State has extensive resources at its disposal to meet its legal obligations under the FOIA statute, and the agency has actually experienced a dramatic decline in the number of FOIA requests it receives (receiving nearly 20,000 fewer requests in the last fiscal year than in the year State cites to support its argument). This Court should not punish American Oversight and the

[19] *See, e.g.*, Nicholas Fandos et al. *White House Declares War on Impeachment Inquiry, Claiming Effort to Undo Trump's Election*, N.Y. Times, Oct. 10, 2019, https://www.nytimes.com/2019/10/08/us/politics/sondland-trump-ukraine-impeach.html; Natasha Bach, *The 5 State Department Officials Pompeo Doesn't Want to Testify*, Fortune, Oct. 4, 2019, https://fortune.com/2019/10/04/kurt-volker-testimony-yovanovitch-kent-sondland-brechbuhl-pompeo/; Weiyi Cai & Alicia Pariapiano, *Subpoenas and Requests for Evidence in the Trump Impeachment Inquiry*, N.Y. Times (Oct. 14, 2019, 2:10 PM), https://www.nytimes.com/interactive/2019/10/04/us/politics/president-trump-impeachment-inquiry.html.

public by denying relief necessary to prevent irreparable harm on the basis of State's claims that, as a result of its own failure to adequately fund and resource its FOIA operations, such relief would necessarily harm other FOIA requesters.

A. The Requested Relief Is Overwhelmingly in the Public Interest Because It Will Provide the Public, Members of Congress, and Other FOIA Requesters with Urgently Needed Information Concerning a Matter of Immense Importance.

The records American Oversight has requested from State concern a matter of extraordinary public interest, and granting the requested relief here will allow the public to participate in an informed manner in the momentous process that Congress has undertaken to determine if the president should be impeached and removed from office for using the power of the federal government to pressure a foreign nation to investigate a political opponent in order to affect the forthcoming U.S. presidential election. As the Supreme Court has said, "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This is a matter where the "overriding public interest" in ordering State to comply with "its statutory mandate" in a timely fashion is obviously necessary to the achieving the basic purpose of the FOIA statute and to ensuring the continued functioning of our democratic society. *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (cited in *Wash. Post*, 459 F. Supp. 2d at 76).

State has even conceded, in granting American Oversight's requests for expedited processing, that the information requested is urgently needed to inform the public. And American Oversight intends to, as is its practice with all public records it receives, work to

broadly disseminate the requested information and publicly post the records received for all to view on its website. McGrath Decl. ¶¶ 3–4.

The public interest is magnified further here because, in addition to broadly informing the citizenry with respect to an urgent matter of the utmost importance, the requested relief here will also aid in informing members of Congress who will be charged with making the incredibly weighty determinations of whether to vote to impeach and, possibly, to remove the president from office. The congressional committees conducting the impeachment inquiry have requested many of the same records that American Oversight seeks here,[20] McGrath Decl. ¶ 9, but the Trump administration has forcefully resisted producing these records to Congress.[21] McGrath Decl. ¶ 10. Since the filing of American Oversight's motion, the White House has made clear that the administration will continue to entirely refuse to cooperate with the congressional inquiry,[22] and agencies have continued to issue blanket refusals to produce documents subpoenaed by congressional committees without any assertion of privilege.[23] The efforts of the administration to obstruct congressional access to relevant information greatly increases the public's need for the information American Oversight has requested, as even the public's elected

[20] *See* Ltr. from Rep. Engel, Rep. Schiff, & Rep. Cummings, Chairs of U.S. House of Reps. Committees on Foreign Affairs, Intelligence, & Oversight, to Mike Pompeo, Sec'y of State, (Sept. 9, 2019), https://bit.ly/33CD3Im; Sarah D. Wire & Chris Megerian, *Democrats Threaten to Subpoena White House for Documents About Trump's Ukraine Call*, L.A. Times (Oct. 2, 2019, 8:34 AM), https://lat.ms/2oEgN1O.

[21] *See* Ltr. from Mike Pompeo, Sec'y of State, to Rep. Engel, Chair of U.S. House of Reps. Comm. on Foreign Affairs (Oct. 1, 2019), https://wapo.st/2oz2JGO; Secretary Pompeo (@SecPompeo), Twitter, https://twitter.com/ SecPompeo/status/1179040126032367616 (last visited Oct. 3, 2019) (characterizing requests as "an attempt to intimidate, bully, [and] treat improperly" State officials).

[22] Fandos, *supra* note 19; Ltr. from Pat Cipollone, *supra* note 9.

[23] *See* Egan & Kube, *supra* note 11.

representatives in Congress (who are themselves also members of the public) are being denied access to this vitally important information.

The public interest would be overwhelming served by granting the requested relief here, and the public interest only stands to be irreparably harmed if this Court fails to grant this relief.

B. It is State's General Failure to Process FOIA Requests in a Timely Manner—Even as It Has Seen a Dramatic Decline in Requests—That Harms FOIA Requesters, Not Plaintiff's Urgently Needed Relief in this Extraordinary Case.

The true thrust of State's defense against the granting of American Oversight's requested relief in this case—where State does not contest the urgent public need for the requested information and puts forward only an untenable argument that the prospect of irreparable harm here is insufficient—is that State is overburdened with FOIA requests and granting the relief necessary to prevent irreparable harm will adversely affect other FOIA requesters. Def.'s Opp'n at 5–7, 17–21.

In arguing against the granting of relief in this case out of purported concern for the interests of other FOIA requesters, State stunningly omits information that shows the agency has experienced a dramatic decline in the number of FOIA requests it receives, while it has also been responding to thousands fewer FOIA requests annually. State asserts that its FOIA processing has "been put under increasing strain over the past decade," citing an increase in the number of FOIA requests received from less than 6,000 in FY 2008 to "almost 28,000 in FY 2016 (an increase of more than 350%)." Def.'s Opp'n at 6. But *since* FY 2016, State has experienced a dramatic decline in the annual number of new FOIA requests it has received—to less that 7,500 in FY 2017 and less than 8,500 in FY 2018—each year receiving significantly less than a third of

the requests received in the year highlighted by State.[24] Further, as the number of requests received by State has declined, State has recently also significantly *reduced* the number of requests that it has processed despite the continued existence of a substantial request backlog. In FY 2016, State processed over 15,000 requests, but in FY 2018 State reduced the number of requests processed significantly, to less than 11,000.[25] Rather than using the opportunity presented by the large decline in the number of requests received in recent years to significantly reduce the agency's backlog of requests, State has recently simply processed fewer requests.

State's citation to apparently large raw numbers of FOIA requests received is also misleading when not put in context of the resources at State's disposal. State is a massive federal agency with approximately 69,000 employees and a budget of over $52 billion.[26] Despite State's protestations about its inability to provide the relief American Oversight has requested to prevent irreparable harm, the agency spends less than 0.07% of its budget on meeting its obligations under FOIA and allocates less than 0.4% of its staff resources to FOIA processing.[27] Congress

[24] U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2017 at 13, https://foia.state.gov/Learn/Reports/Annual/2017.pdf; U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2018 at 13, https://foia.state.gov/Learn/Reports/Annual/2018.pdf.

[25] U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2016 at 12, https://foia.state.gov/Learn/Reports/Annual/2016.pdf; U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2018 at 13, https://foia.state.gov/Learn/Reports/Annual/2018.pdf.

[26] U.S. Dep't of State, Mission, https://careers.state.gov/learn/what-we-do/mission/ (describing State's workforce as including 13,000 foreign service officers, 11,000 civil service employees, and 45,000 overseas locally employed foreign service staff); U.S. Dep't of State, Congressional Budget Justification at 8 (Mar. 11, 2019), https://bit.ly/2VU0BWq (showing actual FY 2018 State budget of $52.404 billion, while administration sought a dramatic *reduction* in available resources to approximately $40 billion).

[27] *See* U.S. Dep't of State, Freedom of Information Act Annual Report Fiscal Year 2018 at 13,

has provided State with ample resources to meet its legal obligations under FOIA on a more reasonable time frame, and it has been State's own decisions to chronically under-resource FOIA processing that has harmed FOIA requesters and the public by frustrating timely transparency and accountability regarding State's operations.

This Court should not punish American Oversight and the public it serves with irreparable harm based on these self-serving arguments, which rest on a belatedly-discovered concern with preventing harm to other FOIA requests, a harm that could have been avoided in the first instance had State adequately funded its legal obligations under FOIA over the past decade. It is State's own policies and resource allocation decisions that are the true limits on State's ability to meet its legal obligations. Defendant's argument rests entirely on the false premise that FOIA processing is a zero-sum game in which enforcing one requester's clear legal rights under the statute will necessarily be to the detriment of other requesters. But State provides no cogent explanation for why, or how, being ordered to meet its legal obligations under FOIA on Plaintiff's request would *necessarily* harm any other specific requester.

FOIA requesters need not be pitted against one another in a Hobbesian competition for scarce FOIA resources. Congress has provided ample funds. The fact that State has voluntarily opted to so underfund and under-resource the FOIA processing capabilities necessary to meet its legal obligations that it has developed a backlog of even *expedited* requests does not justify the agency's failure to meet its legal obligations to Plaintiff or militate against the Court enforcing those legal obligations. It would create a significant moral hazard if agencies—and, more specifically, their leadership—were permitted to evade their statutory obligations to provide

https://foia.state.gov/Learn/Reports/Annual/2018.pdf (showing State spent approximately $36 million on FOIA processing FY 2018, and allocates the equivalent of approximately 276 employees to FOIA processing).

timely transparency into agency operations, particularly into matters of plainly urgent public concern concerning potentially inappropriate or illegal administration actions, by making voluntary decisions to starve FOIA processing of the resources necessary to meet those legal requirements.

In any case, as American Oversight noted in its opening brief, numerous other FOIA requesters are actually likely to be *aided* by the granting American Oversight's requested relief here. Pl.'s Br. at 20. As State acknowledges, the agency has already received numerous requests seeking documents related to the administration's alleged efforts to pressure Ukraine to investigate. Def.'s Opp'n at 21. Given the centrality of the records American Oversight has requested to this matter of intense public concern—records reflecting communications with Mr. Giuliani, relevant records of senior State officials, records related to the removal of the former U.S. Ambassador to Ukraine (who has testified now as a part of the impeachment inquiry[28]), *see* Pl.'s Br. at 3–7—it is safe to assume that many of the records State will process and release in response to Plaintiff's requests will also be records sought by other requesters, which will then be readily available for prompt release to those requesters. American Oversight, moreover, intends to rapidly disseminate the information in the requested records and to post them on its free, publicly available website for all to view, as is its practice. McGrath Decl. ¶¶ 3–4. And, more generally, a court order requiring State to do a better job of meeting its legal obligations under FOIA can only accrue, in the long run, to the interests of all FOIA requesters.

Finally, State's argument that requiring it to respond to American Oversight's requests by a date nearly six months after they were submitted could harm the public interest in shielding

[28] *See* Desiderio et al., *supra* note 5.

information that Congress has deemed exempt from disclosure is simply wrong. Def.'s Opp'n at 21. It is true that Congress provided for exemptions in the FOIA statute, including for classified information, *but* Congress also intentionally set time limits for responding to requests, which passed months ago for American Oversight's May 21, 2019 requests. 5 U.S.C. § 552(a)(6)(A)(i) (requiring a determination in 20 working days); § 552(a)(6)(B)(i) (allowing up to an additional ten working days where "unusual circumstances" are present).[29] Plaintiff does not ask the Court to order any limitation on the resources State devotes to conducting any necessary review to avoid production of exempt information on the requested timeframe, nor is there any serious argument that Plaintiff's proposed order, requiring a determination long after the 30 working days Congress believed sufficient, would necessitate that State produce exempt information without conducting any necessary review.

CONCLUSION

For the foregoing reasons, Plaintiff American Oversight respectfully requests that this Court grant a preliminary injunction requiring State to make timely determinations on American Oversight's FOIA requests and promptly process those requests on an expedited basis and produce all non-exempt responsive records and an index justifying the withholding of any withheld records by November 15, 2019, or such other date as the Court deems appropriate.

[29] State's concluding reference to "unnecessary litigation," Def.'s Opp'n at 22, should not be credited. Even here where the agency has acknowledged the obviously urgent need to inform the public about the subject matter of the requested records, it is unwilling to provide any timeline or estimate whatsoever for when it will respond to the requests. Perhaps litigation might become unnecessary if State were to proactively comply with its statutory obligations to make timely determinations and promptly produce non-exempt responsive records, especially in extraordinary cases like this one where the records concern a matter of urgent public concern.

Dated: October 18, 2019

Respectfully submitted,

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